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82-1697
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

BOARD OF TRUSTEES OF CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioner,

vs.

TONI REYES, RALPH REYES, SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED, GEORGE C. BARRETT, as Judge of said Court and MICHAEL HENNESSEY, as Sheriff of the City and County of San Francisco,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Is the divorced spouse of a participant in an employee pension benefit plan covered by ERISA herself a participant in the plan by virtue of the provisions of the California community property laws, notwithstanding that she is not included within the term "participant" as used in the plan and the plan provides that no pension, prospective pension, right or interest of a participant or pensioner shall be subject to any order, decree, execution or other legal or equitable process or proceeding for the benefit of such spouse directed to the plan?

2. Under the circumstances stated in question 1, is the divorced spouse of the participant entitled to an award of attorney fees against the employee pension benefit plan as a participant under ERISA § 502(g), 29 U.S.C. § 1132(g), in a marriage dissolution proceeding under the California Family Law Act in which the plan was ordered to pay directly to the spouse a community property share of the participant's pension benefit?

3. Do the principles of federalism recognized in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 756 (1971), apply to a case where the fiduciary of an ERISA plan has invoked the exclusive jurisdiction of the federal district court to enjoin acts which violate ERISA and the terms of the plan and to obtain other appropriate equitable relief to redress such violations and enforce the provisions of ERISA and the terms of the plan?

4. If the principles of federalism do apply in the circumstances stated in question 3, should the federal district court retain jurisdiction over the federal issues until the state issue leading to absention is resolved?

5. Does ERISA preempt state community property law as it relates to the payment of benefits by an employee pension benefit plan covered by ERISA?[1]

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[1]The names of all parties to the proceedings in The United States Court of Appeals for the Ninth Circuit are as follows:

Board of Trustees of the
Carpenters Pension Trust Fund
for Northern California
Plaintiff/Appellant

The individual members of the Board are as follows:

Employer Trustees	Employee Trustees
John Griffin	Warren O. Stevens
Robert Balliet	Jim R. Green
George Detweiler	Harvey H. Landry
Charley Petersen	Frank Morabito
Paul C. Petersen	Larry Null
Howard A. Russell	Ken Oliver
Lawrence F. Walters	John L. Watts

Toni Reyes — *Defendant/Appellee/Real Party in Interest*

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TONI REYES, RALPH REYES, SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED, GEORGE C. BARRETT, as Judge of said Court and MICHAEL HENNESSEY, as Sheriff of the City and County of San Francisco,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Board of Trustees of the Carpenters Pension Trust Fund for Northern California respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on September 23, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 688 F.2d 671 and is printed in Appendix A. The order of the Court denying a rehearing is printed in Appendix B. The judgment and Order of the United States District Court for the Northern District of California is printed in Appendix C.

JURISDICTION

The opinion of the Court of Appeals was filed and entered on September 23, 1982, and its order denying petitioner's timely petition for a rehearing was filed and entered on March 9, 1983. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves §§ 3(7), 3(8), 205, 206(d)(1), 404(a)(1), 502, 503, 514 and 3022(a) of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(7), (8), 1055, 1056(d)(1), 1104(a)(1), 1132, 1133, 1144 and 1222(a), § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), and §§ 4351, 4363, 4363.1, 4363.2 and 4370 of the California Civil Code. These statutes are printed in Appendix D.

STATEMENT OF THE CASE

Petitioner Board of Trustees of the Carpenters Pension Trust Fund for Northern California ("Fund") is the named fiduciary of an employee pension benefit plan ("Plan") covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The Plan was established by a Trust Agreement negotiated through collective bargaining pursuant to the National Labor Relations Act, 29 U.S.C. § 151 et seq., between employers and the Carpenters Unions in the 46 Counties of Northern California and was created and is presently existing in conformance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5).

The Plan, as revised to conform with ERISA effective September 1, 1976, defines a "Participant" in the Plan as "a Pensioner, or an Employee who meets the requirements for participation in the Plan as set forth in Article 2, or a former Employee who has acquired a right to a Pension

under this Plan and has Separated from Covered Employment" (Plan, Section 1.19, App. E, p. E-1).[2] An "Employee" is defined as "any Employee of an Individual Employer who performs one or more hours of work covered by any of the Collective Bargaining Agreements" and employees of certain labor organizations or other entities "with respect to whose work contributions are made to the Fund" (Plan, Section 1.11, App. E, p. E-1). The term "Spouse" is defined as a person to whom a Participant or Pensioner is legally married (Plan, Section 1.24, App. E, p .E-1). Article 2 of the Plan provides that an "Employee who works in Covered Employment shall become a Participant as soon as he has performed at least 300 hours of Work in Covered Employment during any Calendar Year" (Plan, Section 2.02, App. E, p. E-2),

Section 10.12 of the Plan provides as follows (App. E, p. E-2):

> *Section 10.12. Non-Assignment of Benefits.* Each Participant, Pensioner or Beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, alienating, hypothecating or otherwise disposing of his pension, prospective pension or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, alienation, hypothecation or other disposition. Any such pension, prospective pension, right or interest shall not be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable pro-

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[2]The Summary Plan Description of the Pension Plan was included in the record below as Exhibit 1 to CR 5. The pertinent sections of the Plan are printed in Appendix E.

cess or proceeding to the fullest extent permissible by law.

The right of a Spouse of any Participant or Pensioner shall be limited to a community property share of the pension actually received by a Pensioner, after such receipt, and to rights as the designated Beneficiary of a Participant or Pensioner, or other rights expressly provided in this Plan and no pension, prospective pension, right or interest of a Participant or Pensioner shall be subject to any order, decree, execution or other legal or equitable process or proceeding for the benefit of such Spouse directed to the Fund."[3]

On June 26, 1980, petitioner commenced this action in the federal district court against respondent Toni Reyes ("Toni"), as the principal defendant, to enjoin enforcement of (1) and order of the California superior court directing payment out of the Fund of an award of attorney's fees to Toni and (2) a writ of execution levied against the pension benefit account of the Fund under a judgment of the superior court against the Fund awarding Toni $8026 as her community property share of pension benefits payable by the Fund to defendant Ralph Reyes ("Ralph"). The action also sought a judgment adjudging and declaring the fiduciary duties of petitioner under ERISA and § 303 of the Consumer Credit Protection Act, 15 U.S.C. § 1673, with respect to the claims of Toni and Ralph.

The judgment for $8026 was entered in a marriage dissolution proceeding brought by Toni against Ralph under the California Family Law Act (Cal. Civ. Code § 4000 *et seq.*) to which the Fund had been joined as a party claimant pursuant to rules adopted by the California Judicial Council under that Act (Cal. Civ. Code § 4001; Cal. Rules

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[3]Throughout this petition emphasis is added unless otherwise noted.

of Court, Rule 1250 *et seq.*). The Fund appealed from the judgment to the California Court of Appeal, and Toni thereupon moved in the superior court for an order requiring the Fund and/or Ralph to pay her attorney's fees and costs in defending the appeal. The motion was denied and Toni appealed to the California Court of Appeal from the order of denial.

On the Fund's appeal, the Court affirmed the judgment in an unpublished opinion in 5 Civil No. 3575 relying on the reasoning in *In re Marriage of Campa* (1979) 89 Cal. App.3d 113, 152 Cal.Rptr. 362, *app. dism.*, (1980) 444 U.S. 1028, 100 S.Ct. 696. On Toni's appeal, the Court affirmed the order denying the motion for attorney's fees and costs in a published opinion, *In re Marriage of Reyes* (1979) 97 Cal.App.3d 879, 159 Cal.Rptr. 84, in which it dismissed Toni's contention, raised for the first time on oral argument, that she was entitled to attorney's fees under ERISA § 502(g), 29 U.S.C. § 1132(g), on the grounds that the contention had been waived and:

> "In any event, section 1132, subdivision g, expressly authorizes an award of attorney's fees only to a participant, beneficiary, or fiduciary. Appellant [Toni] has failed to establish that she falls within one of the categories of parties entitled to attorney's fees under this section."

(97 Cal.App.3d at p. 880, 159 Cal.Rptr. at p. 86).

After the remittiturs on the appeals had been filed in the superior court, petitioner commenced deducting $220, the amount awarded to Toni by the judgment, from Ralph's monthly pension benefit and paying such amount to Toni under protest, and with an express reservation of all of the Fund's rights. It refused, however, to pay her the amount awarded with respect to pension benefits already paid to Ralph, totalling $8026, and which Ralph had failed to remit to her.

Also after the filing of the remittiturs, Toni again moved in the superior court for an award against the Fund for attorney's fees incurred by her in defending against the Fund's appeal. The court granted her motion on the ground that Toni was a "beneficiary" within the meaning of ERISA § 502(g), 29 U.S.C. § 1132(g), "by reason, at least of this Court's order, and its affirmance on appeal," and gave the Fund leave to conduct reasonable discovery prior to a hearing to determine the amount of the fees.

The Fund petitioned for a peremptory writ from the California Court of Appeal restraining further action to award Toni attorney's fees against the Fund. Toni, on her part, levied execution against the Fund's pension benefit account to enforce the judgment for $8026. Petitioner thereupon filed this action, invoking the jurisdiction of the federal district court under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), 29 U.S.C. § 2201 and, as to the execution, Section 303 of the Consumer Credit Protection Act, 15 U.S.C. § 1673.

The Fund's petition for a peremptory writ from the California Court of Appeal was denied, and after a hearing on the amount of the fees, Toni was awarded $8500. The superior court also denied the Fund's claim of exemption from the execution levied against its pension benefit account. The Fund appealed to the California Court of Appeal from both orders of the superior court.

The federal district court granted a preliminary injunction restraining enforcement of both the order allowing attorney's fees and the writ of execution, but after the decisions of the United States Court of Appeals for the Ninth Circuit in *Carpenters Pension Trust for Southern California v. Kronschnabel* (1980) 632 F.2d 745, *cert. den.* (1981) 453 U.S. 922, 101 S.Ct. 3159, and *Stone v. Stone* (1980) 632 F.2d 740, *cert. den.* (1981) 453 U.S. 922, 101 S.Ct. 3158, the district court dissolved the preliminary

injunction and entered a judgment and order on Toni's motion dismissing petitioner's complaint without prejudice as to certain enumerated issues and adjudging, among other things, that "[p]ursuant to *Stone* . . . Toni . . . is a participant pursuant to Section 502(g) of ERISA, 29 U.S.C. § 1132(g), and therefore is entitled to attorney's fees in this action against the Carpenters Pension Trust Fund for Northern California" (App. C, p. C-3).

A timely appeal was taken to the Court of Appeals for the Ninth Circuit, and petitioner suggested that the appeal be heard initially en banc in view of the fact that the appeal required reconsideration of that Court's holdings in *Kronschnabel* and *Stone* in the light of the decisions of this Court in *Alessi v. Raybestos Manhattan, Inc.* (1981) 451 U.S. 504, 101 S.Ct. 1895, *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, and *Ridgway v. Ridgway* (1981) 454 U.S. 46, 102 S.Ct. 49.

The suggestion of an en banc hearing was not accepted and the appeal was heard by a panel of the Court. The panel affirmed the summary judgment of the district court in *Board of Trustees of Carpenters Pension Trust Fund for Northern California v. Reyes* (1982) 688 F.2d 671, ruling as follows:

(1) Petitioner's claim that "ERISA acts to preempt community property interests" was barred by the doctrine of res judicata since petitioner had not sought timely review by this Court of the judgment of the California Court of Appeal in 5 Civil No. 3575 (App. A, pp. A-4-5).

(2) Because none of the decisions of this Court cited by petitioner addressed "whether ERISA acts to preempt state community property law" the panel was compelled by this Court's decision in *Campa* to hold that attorney's fees were properly awarded by the district court to Toni as a participant within the meaning of ERISA § 502 (a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (App. A, p. A-8).

(3) The principles of federalism recognized in *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 756, limited the power of the district court to enjoin enforcement of the California court's award of attorney's fees to Toni pursuant to ERISA. "The state court, without interference by process of this court, should determine the rights of the parties in the case before it, including the effect to be given to the instant case" (App. A, p. A-9).

In connection with ruling (2) the panel said (App. A at p. A-8):

> "We are cognizant of the fact that there are many questions, not yet resolved by the Supreme Court which result from the interplay between the law of community property and the provisions of ERISA. **Review of these important issues by the United States Supreme Court would greatly assist fund administrators in meeting their responsibilities.** See, e.g., *United States v. Ross* ..... U.S. ....., 102 S.Ct. 2157, 2162, 72 L. Ed. 2d 572 (1982)."

Petitioner petitioned for a rehearing and suggested the appropriateness of a rehearing en banc. As one of the situations justifying the rehearing, petitioner cited the apparent conflict between the decision of the panel and the decision of the Court in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California* (1982) 679 F.2d 1307, which conflict was not addressed in the panel's opinion.

The panel denied the petition and rejected the suggestion that the rehearing be en banc, saying (Appendix B, pp. B-1-2):

> "The cases cited by petitioner, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 679 F.2d 1307 (9th Cir. 1982) and *Alessi v. Raybestos-Manhattan,*

Inc., 451 U.S. 504 (1981) are inapposite. Neither case deals with an attempt by the state to apply community property law to pension funds. As pointed out in the *Reyes* opinion, we are bound by the summary dismissal of *In re Marriage of Campa*, 444 U.S. 1028 (1980). See *Stone v. Stone*, 632 F.2d 740, 742 (9th Cir. 1980); *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 748 (9th Cir. 1980). **Petitioner's arguments based on Alessi should be addressed to the Supreme Court, not this court.**"

REASONS FOR GRANTING THE WRIT

The principal reason for granting the writ is simply stated. The Court of Appeals below decided a federal question in conflict with applicable decisions of this Court.

The Court of Appeals did so apologetically. It said that there were important issues resulting from the interplay between the law of community property and the provisions of ERISA which were unresolved, but that since none of the cases raising those issues addressed whether ERISA acts to preempt state community property law, it was compelled to follow the interpretation in *Stone* and *Kronschnabel* of this Court's summary action in *Campa* (App. A, p. A-8). It concluded, in denying the petition for a rehearing, that petitioner's arguments based on the decision of this Court in *Alessi*, "should be addressed to the Supreme Court, not this court" (App. B, p. B-2).

The conflict between the decision of the Court of Appeals in *Reyes* and the decision of this Court in *Alessi* is direct and total. The Court of Appeals held that Toni was a participant in petitioner's Plan for the purpose of claiming an award of an attorney's fee under ERISA § 502, 29 U.S.C. § 1132, in connection with an action purportedly brought by her "to recover benefits due to him under the *terms* of his plan, to enforce his rights under the *terms*

of the plan, or to clarify his rights to future benefits under the *terms* of the plan" (ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)). The terms of petitioner's Plan, however, make clear that Toni is not a participant in the Plan and is not entitled to rights under the Plan as a participant. It is likewise clear that her action against the Plan was a proceeding under a state law, the Family Law Act (Cal. Civ. Code § 4000 *et seq.*), in which she asserted rights under the state community property law which intruded upon and contravened the terms of the Plan.

This Court decided in *Alessi* that ERISA does not permit such an intrusion of state law upon the terms of an employee benefit plan covered by that Act. It said (451 U.S. at pp. 525-526, 101 S.Ct. at p. 1907):

> "Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for the preemption of state efforts to regulate pension terms. See *Teamsters v. Oliver*, 358 U.S. 283, 296, 79 S.Ct. 297, 304 3 L.Ed.2d 312 (1959). . . . **As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring preemption of intrusive state law.**"

The fact that *Alessi* addressed "the issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards" rather than "whether ERISA acts to preempt state community property law" (App. A, p. A-8) does not make its holding "inapposite" (App. B, p. B-1) to the issue in *Reyes*. As this Court said in *Ridgway v. Ridgway* (1981) 454 U.S. 461, at pp. 54-55, 102 S.Ct. 49, at pp. 54-55:

> "Notwithstanding the limited application of federal law in the field of domestic relations generally . . . [t]he relative importance to the State of its own law

> is not material when there is a conflict with a valid federal law, for the framers of our Constitution provided that the federal law must prevail. . . . And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments."

The conflict between *Alessi* and the Ninth Circuit's interpretation of this Court's summary action in *Campa* is likewise clear. In *Campa* the California Court of Appeal expressly rejected the consideration which this Court found to be persuasive in *Alessi*, saying (89 Cal. App. 3d at pp. 126-127, 152 Cal.Rptr. at pp. 369-370):

> "The Fund next maintains that section 1144 of ERISA affirms the principle that provisions of collective bargaining agreements negotiated under the aegis of the National Labor Relations Act generally supersede conflicting state law. (E.g., *Teamsters Union v. Oliver* (1959) 358 U.S. 283 [3 L.Ed. 312, 79 S.Ct. 297]). The pension plan here purports to prohibit the nonemployee spouse from obtaining any order or other process against the Fund. This provision, the Fund urges, must prevail over contrary California law.
>
> "This argument is untenable in the light of *Malone v. White Motor Co., supra* 435 U.S. 497 [98 S.Ct. 1185]. . . ."

In *Alessi* this Court said concerning *Malone* (451 U.S. at p. 526, n. 23, 101 S.Ct. at p. 1907, n. 23):

> "There, because Congress preserved a state role in pension regulation before ERISA, the plurality created an exception to the general rule preempting state regulation of collective bargaining. [Citation] **This exception no longer applies, however, now that ERISA, with express preemptive intent, has eliminated state regulations of most pension plans.**"

The decision of the Court of Appeals does "'major damage'" to "'clear and substantial'" federal interests protected by ERISA (see *Ridgway v. Ridgway, supra,* 454 U.S. at p. 54, 102 S.Ct. at p. 54). One of the key provisions of ERISA is that a fiduciary of a covered plan "shall discharge his duties with respect to the plan solely in the interests of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and . . . (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV." The decision of the Court of Appeals requires that petitioner, the fiduciary of an ERISA plan, must recognize and treat a person as a participant of the plan who does not qualify as a participant under the terms of the plan and must pay such person an attorney's fee ordered by a state domestic relations court in a proceeding under state law to recover benefits to which such person was not entitled under the terms of the plan. Such a requirement violates one of the basic principles which underlie the fiduciary responsibility provisions of ERISA, namely, "that [principle] requiring the trustees to act only in accordance with the terms of the trust" (see *Sinai Hosp. of Baltimore v. Nat. Ben. Fund* (4th C.A. 1982) 697 F.2d 562, 566), and it cannot be permitted to stand without seriously compromising that principle.

The decision below is particularly destructive of the fiduciary responsibility provisions of ERISA because of the nature of the proceedings to which it applies.

The Fund administered by petitioner was joined as a party to Toni's proceeding to dissolve her marriage to Ralph in accordance with California's joinder practice, which in 1977 was codified in the Civil Code (Cal. Stats. 1977, c. 860, p. 2599). Under this practice no order or judg-

ment in a marriage dissolution proceeding is enforceable against an employee pension benefit plan unless the plan has been joined as a party to the proceeding (Civ. Code, § 4351). The joinder is accomplished by an order entered by the court clerk, followed by a pleading of the party requesting joinder "setting forth the party's claim against the plan and the nature of the relief sought" and by service of summons on the plan. (Civ. Code § 4363.1(a)). To avoid entry of its default, the plan must file a notice of appearance in the proceeding (Civ. Code, § 4363.1(c)). If a notice of appearance is filed, the plan must be served with any order which affects the plan or which affects any interest the participant employee or his spouse may have or claim under the plan (Civ. Code § 4363.2(d)). Within 30 days after service of the order, the plan may file a motion to set aside or modify "those provisions of the order affecting it," and if such a motion is filed, "the provisions shall not become effective until the court has resolved the motion" *(ibid).*

At the hearing on the motion, "any party may present further evidence on any issue relating to the rights of the parties under the employee pension benefit plan or the extent of the parties' community or quasi-community property interest in the plan" and the court must take account of such evidence in its findings of fact and conclusions of law (Civ. Code § 4363.2(e)). During the pendency of the proceedings, "the court may order any party, except a governmental agency, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceedings and for attorneys' fees" including fees and costs "for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding", provided that "[a]ny order for a party who is not the husband or wife of another party to the proceeding to pay attorneys' fees or costs shall be limited to an amount

reasonably necessary to maintain or defend the action on the issues relating to that party" (Civ. Code § 4370(a)).

Not every participant in petitioner's Plan qualifies for a pension under the terms of the Plan and where the application of a participant involved in a marriage dissolution proceeding is denied, the Fund must actively defend not only against the claim of the divorcing or divorced spouse, but also against the claim of the participant. Otherwise, evidence presented by the principal contending parties on an issue "relating to the rights of the parties under the employee pension benefit plan" (which evidence might well be self-serving or even collusive) could result in findings of fact adverse to the Fund and to the other participants and beneficiaries of the Plan to whom petitioner owes fiduciary obligations (see *Thurber v. Western Conference of Teamsters Pension Plan* (9th C.A. 1976) 542 F.2d 1106, 1109; *Wilson v. Board of Trustees* (9th C.A. 1977) 564 F.2d 1299, 1302). Ironically, in any such contest the participant would be required to exhaust his administrative remedies under the Plan before pursuing his claim in court (ERISA § 503, 290 U.S.C. § 1133; *Amato v. Bernard* (9th C.A. 1980) 618 F.2d 559, 566), whereas, under the holding of the California Court of Appeal in *Campa*, his ex-spouse would not (89 Cal. App.3d at pp. 119-120, 152 Cal.Rptr. at pp. 364-365).

Petitioner must be concerned not only with the rights and interests of participants and beneficiaries of the Plan generally, but also with the federally created rights and interests under the Plan of beneficiaries specifically designated by ERISA; namely, the surviving spouses of deceased participants.

ERISA § 205(a), 29 U.S.C. § 1055(a), requires a pension plan that provides for the payment of benefits in the form of an annuity, to provide for the payment of such benefits in a form having the effect of a qualified joint and survivor annuity. A "qualified joint and survivor annuity" is defined

as "an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single annuity for the life of the participant" (ERISA § 205(g)(3), 29 U.S.C. § 1055(g)(3)). ERISA § 205(d), 29 U.S.C. § 1055(d), provides that a plan "shall not be treated as not satisfying the requirements of this section solely because the spouse of the participant is not entitled to receive a survivor annuity . . . unless the participant and his spouse have been married throughout the 1-year period ending on the date of such participant's death." ERISA § 205(e), 29 U.S.C. § 1055(e), requires that a participant be given the option, after having received an explanation of the terms and conditions of the annuity and the effect of the exercise of such option, "not to take such joint and survivor annuity." ERISA § 205(h), permits the plan to take into account in any equitable fashion any increased costs resulting from providing joint and survivor annuity benefits.

Petitioner's Plan provides an optional qualified joint and survivor annuity in the form of a "Husband and Wife Pension" (Plan, App. E, pp. E-3-7). As permitted by ERISA and implementing regulations, the monthly benefit payable during his lifetime to a Pensioner who elects the Husband and Wife Pension is actuarially reduced to compensate for the increased cost of providing the survivorship feature (Plan, § 7.04).

The Plan provides that a Husband and Wife Pension shall not become effective for a Pensioner if the Pensioner and his Spouse had not been lawfully married to each other throughout the year before his pension payments began and that the Pension shall not become effective for a Participant, other than a Pensioner, if the Participant and his Spouse were not lawfully married to each other throughout

the year preceding the Participant's death (Plan, § 7.05 (a)(1) and (2)). The Plan also provides that the monthly amount of the Husband and Wife Pension, once it has become payable, shall not be increased if the marriage of the Pensioner and the Spouse is subsequently legally terminated (Plan, § 7.06).

Under the statutory scheme mandated by ERISA § 205(a), 29 U.S.C. § 1055(a), there is an inherent conflict between the interests of the divorcing or divorced spouse of a participant and the interests of the surviving spouse of the participant. The divorcing or divorced spouse is interested in having the participant elect the form of pension which will provide him with the highest available benefit, since the amount of her share of the benefit normally if not always increases with the amount of the benefit. On the other hand, it is generally in the interest of the surviving spouse to have the participant elect the joint and survivor annuity, for while the monthly benefit during the participant's lifetime is actuarially reduced, she is assured of the continued payment to her of one-half of the benefit after his death.

The community property law, as interpreted and applied by the California courts, has almost invariably favored the interests of the divorcing or divorced spouse of a participant over the interests of his surviving spouse. For example, in *In re Marriage of Lionberger* (1979) 97 Cal.App. 3d 56, 158 Cal.Rptr. 535, *cert. den.* (1980) 446 U.S. 951, 100 S.Ct. 2917, the court held that in order to protect the interests of his divorcing spouse, a participant in an ERISA plan could be ordered not to elect a joint and survivor annuity and the trustees of the plan could be directed to pay benefits to the participant only in a form other than a joint annuity. In *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 174 Cal.Rptr. 493, the Court held that a plan participant who was eligible for retirement under his plan could

be ordered to pay his divorcing spouse a community property share of the pension for which he would have been entitled if he had elected to retire, even though the participant was in his early 50s and was not required by the plan to retire until he reached age 70. And in *Gunn v. United Air Lines, Inc.* (1982) 138 Cal.App.3d 765, 188 Cal.Rptr. 302, the court held that the divorcing spouse of a plan participant could deprive the surviving spouse of the participant of any interest in the participant's pension through a contract with the participant requiring that he designate their children as beneficiaries of the death benefits payable under the plan.

Much more can be said, and was said in the courts below, about "the interplay between the law of community property and the provisions of ERISA" (App. A, p. A-8). It is apparent, however, from what has already been said that the "unresolved issues" referred by the Court of Appeals to this Court for review are important and are of grave concern to fund administrators such as petitioner. By reason of the joinder procedure described above, the Fund has been joined as a party claimant to more than two hundred marriage dissolution proceedings in superior courts throughout California and the number of such joinders is increasing every week.

Orders issued in these proceedings and served on the Fund may violate California law; for example, by failing to give the participant employee credit for his separate property entitlement in a disability pension (see *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 788). Or they may violate ERISA or other federal law; for example, by awarding to the spouse more than a community property share of the pension benefit and thereby offending ERISA's anti-alienation provision (ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1)); or by impairing the rights of a surviving spouse under the joint and survivor annuity mandated by

ERISA (ERISA § 205, 29 U.S.C. § 1055); or by subjecting a greater percentage of the participant's pension share to a support order than is permitted by the Consumer Credit Protection Act (see 15 U.S.C. § 1673(b)(3)). Nevertheless, the petitioner is inhibited if not prevented from effectively challenging the orders by the holding in *Stone*, reaffirmed by the court below, that a divorcing spouse or ex-spouse is a "participant" in the Fund and therefore is as much a beneficiary of the fiduciary duties imposed upon trustees by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), as the employee and his surviving spouse, and by the holding of the Merced County superior court and the courts below that she is entitled to an award of an attorney's fee against the Fund under ERISA § 502(g).

This Court is giving plenary consideration in *Kramarsky v. Delta Air Lines, Inc.*, No. 81-1578, to the questions as to whether ERISA preempts provisions of the New York Human Rights Law prescribing the terms and conditions of ERISA-covered welfare plans by prohibiting the denial of employee disability benefits based on pregnancy and provisions of the New York Disability Benefits Law which require employers to provide certain minimum disability benefits of pregnant employees. The Court is also giving plenary consideration in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, No. 82-695, to the question whether ERISA preempts the California Revenue and Taxation Code insofar as it permits state authorities to levy upon an ERISA-covered employee welfare benefit plan to satisfy the state income tax liabilities of some of the plan's participants.

The questions presented in this case are more important and far reaching, in terms of their effect upon ERISA and the employee benefit plans, fiduciaries, participants and beneficiaries covered by ERISA, than the questions pre-

sented in the *Kramarsky* and *Franchise Tax Board* cases. In view of the position of the court below that it is compelled to follow *Campa* until this Court informs it in a case involving state community property law that *Campa* is no longer binding, it is imperative that this Court grant plenary review in order to terminate, as soon as possible, the intolerable situation for fund administrators created by the refusal of that court to give critical consideration to the effect of *Alessi* upon this Court's summary action in *Campa*.

We submit that in such review this Court should not be foreclosed by the doctrine of res judicata from giving plenary consideration to the question whether ERISA preempts state community property law as it relates to the payment of benefits by an employee pension benefit plan covered by ERISA. It is true that this issue was decided adversely to petitioner by the California Court of Appeal on the initial appeal in *Reyes*, in reliance upon the reasoning of the California court in *Campa*, and that petitioner did not seek timely review of this decision through petition for writ of certiorari to this Court.[4] The *Reyes* court, however, did not interpret *Campa* as compelling the conclusion that Toni was a participant in the Plan within the meaning of ERISA § 502(a)(1)(B), and ruled to the contrary that Toni was not a participant, beneficiary or fiduciary of the Plan (97 Cal.App.3d 876, 880, 159 Cal.Rptr. 84, 86). The order awarding Toni an attorney's fee as a beneficiary of

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[4]Petitioner's petition for a hearing by the California Supreme Court was denied on December 13, 1979. This Court's order dismissing the appeal in *Campa* for want of a substantial federal question was entered on January 14, 1980. 444 U.S. 1028, 100 S.Ct. 696. In view of the *Reyes* court's interpretation of the *Campa* decision noted in the text, and since the remaining issues in *Reyes* were identical to those in *Campa*, petitioner concluded that an appeal or petition for writ of certiorari addressed to this Court would be futile.

the Plan was issued by the superior court after the remittiturs from the appellate court had been filed in the superior court, and no principle of res judicata protects the validity of that order from plenary review. We point out, further, that state court decisions come within the broad sweep of ERISA preemption and that no distinction is made between the decisions of trial courts and those of appellate courts (ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1)).

The Court's plenary review should also extend to the following:

(1) The holding of the court below that petitioner's action under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to enjoin the initiation or continuation of any proceedings in the state court to enforce the award of attorney's fees runs afoul of the principles of federalism recognized in *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 756.

ERISA gives the federal district courts exclusive jurisdiction over such actions (ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1)) and the authority and responsibility of the federal courts to protect such jurisdiction by enjoining the prosecution of state court actions is clear (see *General Motors Corp. v. Buha* (6th C.A. 1980) 623 F.2d 455, 458-459; *Marshall v. Chase Manhattan Bank* (2d C.A. 1977) 558 F.2d 680, 682; *Cartledge v. Miller* (S.D. N.Y. 1978) 457 F.Supp. 1146, 1151-1153).

(2) In the event that the principles of federalism do apply, the failure of the court below to direct the district court to retain jurisdiction over the federal issues until the state issue leading to abstention is resolved.

Where a federal court invokes the principle of federalism recognized in *Younger*, the court should not dismiss the action outright but should retain jurisdiction over the federal issues until the state issue leading to abstention is re-

solved (*Railroad Commission v. Pullman* (1941) 312 U.S. 496, 501, 61 S.Ct. 643, 646; White, J., dissenting in *Etlin v. Robb* (1982) ..... U.S. ....., 102 S.Ct. 3496, 3498; *L.H. v. Jamison* (9th C.A. 1981) 643 F.2d 1352, 1356).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in order that this Court may give plenary consideration to the many questions resulting from the interplay between the law of community property and the provisions of ERISA and that petitioner and other fund administrators may receive the guidance they so sorely need in meeting their responsibilities.

Respectfully submitted,

San Francisco, California
April 14, 1983.

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Appendix A

BOARD OF TRUSTEES OF CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, An Employee Pension Benefit Plan, Plaintiff-Appellant,

v.

Toni REYES, Ralph Reyes, Superior Court of the State of California In and For the County of Merced, George C. Barrett, As Judge of Said Court, and Michael Hennessey, As Sheriff of the City and County of San Francisco, Defendants-Appellees.

No. 81-4353.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 13, 1982.
Decided Sept. 23, 1982.

Appeal from the United States District Court for the Northern District of California.

Before SWYGERT*, KENNEDY, ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

The Board of Trustees of Carpenters Pension Trust Fund for Northern California [the Fund] filed an action in the district court below against Toni Reyes [Toni] pursuant to the Employment Retirement Income Security Act [ERISA], 29 U.S.C. §§ 1001-1381 and 28 U.S.C. § 2201 (declaratory judgment). The district court granted Toni's

*Hon. Luther M. Swygert, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

motion for summary judgment against the Fund on May 29, 1982 and awarded her $3,296.00 in attorneys' fees in connection with the Fund's federal action. The Fund has appealed to this court.

I. FACTS

In 1976, Toni instituted dissolution proceedings against her husband Ralph Reyes [Ralph] in the superior court for the county of Merced. Shortly thereafter, the Fund was joined as a party to that action pursuant to the California family law joinder statute. See Cal. Civ. Code §§ 4363.1-3.[1] The superior court entered a decree of dissolution and ordered the Fund to pay Toni's community property share of the payments for Ralph directly to her. After judgment was entered, Toni moved for attorney's fees and the trial court denied her motion.

The Fund appealed from the judgment to the California Court of Appeal. The appellate court affirmed the trial court. *In re Marriage of Reyes,* 5 Civil No. 3575 (Cal. Ct. App. Oct. 18, 1979).

Toni appealed from the denial of her motion for attorney's fees to the California Court of Appeal. The court held that Toni's claim for attorney's fees under ERISA, 29 U.S.C. § 1132(g) was (1) waived by her failure to raise the claim until oral argument; and (2) inappropriate because she failed to establish that she was a " 'participant, beneficiary, or fiduciary' " as required by the statute. *In re Marriage of Reyes,* 97 Cal.App.3d 876, 880, 159 Cal.Rptr. 84,

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[1]Toni joined the Fund pursuant to Cal. Civ. Code § 4351. This statute was subsequently amended by Cal. Civ. Code §§ 4363.1-3 which deleted the prior requirement that a judicial order be obtained for joinder.

86 (1979) (quoting 29 U.S.C. § 1132(g)). The court affirmed the denial of her motion for attorney's fees. *Id.*

In March, 1980, Toni moved in the trial court for an award of attorney's fees against the Fund pursuant to ERISA, 29 U.S.C. § 1132(g) for fees incurred in her defense against the Fund's appeal in 5 Civil No. 3575. The court concluded that the award of attorney's fees would be proper under ERISA and granted Toni leave to conduct discovery to determine the reasonableness of fees. The Fund petitioned for a peremptory writ from the California Court of Appeal to restrain Toni from any further action in seeking attorney's fees. The appellate court denied the petition. *Carpenters Pension Trust Fund v. Superior Court*, 5 Civil No. 5725 (Cal. Ct. App. July 26, 1980). The trial court ordered the Fund to pay Toni $8,500 as an award for attorney's fees. The Fund has appealed this order and the case is currently pending before the California Court of Appeal. *Carpenters Pension Trust Fund v. Reyes*, 5 Civil No. 5725.

On June 26, 1980, the Fund filed the action in the matter sub judice seeking, inter alia, to enjoin the enforcement of the state court order awarding Toni attorney's fees and to enjoin "defendants, and each of them, and their respective agents, successors, employees, attorneys and those acting in concert with them, from continuing or initiating any proceedings to enforce an award of attorney's fees to defendant Toni Reyes against the Fund. . . ."

The Fund has raised two issues on appeal. First, it claims that ERISA acts to preempt state community property law as it relates to pension distribution. Second, it claims that Toni may not properly be awarded attorney's fees pursu-

ant to ERISA, 29 U.S.C. § 1132(g). We need not reach the merits of the first issue, however, because we find that the Fund is barred from raising it by the doctrine of res judicata.

II. PREEMPTION ISSUE IS BARRED BY DOCTRINE OF RES JUDICATA

The doctrine of res judicata provides that when there is a final judgment on the merits, further claims by the parties or their privies based upon the same cause of action are barred. *American Triticale Inc. v. NYTCO Services, Inc.*, 664 F.2d 1136, 1146 (9th Cir. 1981). The doctrine of res judicata will prevent federal litigation of a federal constitutional claim that was or might have been raised in a state action that has come to final judgment. *Gallagher v. Frye*, 631 F.2d 127, 129 (9th Cir. 1980) (citing *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1976)). The Fund previously claimed, in the dissolution proceeding filed by Toni, that ERISA acts to preempt community property interests. *In re Marriage of Reyes*, 5 Civil No. 3575. The California appellate court held that there was no preemption by ERISA:

> *In re Marriage of Campa* [89 Cal.App.3d 113, 152 Cal. Rptr. 362] . . . involved precisely the same issues. The same pension fund and the same counsel appeared for the Fund as in the case at bench. The court in *Campa*, after a thorough and well reasoned analysis of those issues resolved all of them against the Fund [finding that community property laws were not preempted by ERISA]. We adopt the reasoning of the court in *Campa* to dispose of the issues in this case.

Id at 3.

At oral argument, the Fund confirmed that it did not seek timely review of this state court judgment through petition for writ of certiorari. *Cf. Vorbeck v. Whaley*, 620 F.2d 191, 193 (8th Cir. 1980) (appellant barred by res judicata where he presented constitutional claims in state court but failed to seek review of state court judgment through petition for writ of certiorari). Thus, there was a final judgment in the state court action involving the Fund and Toni. The claim is barred by the doctrine of res judicata.

III. ATTORNEY'S FEES

The Fund contends that Toni may not properly be awarded attorney's fees pursuant to ERISA, 29 U.S.C. § 1132(g). The Fund has appealed from the award of $3,296 to Toni for attorney's fees in connection with the instant matter. The Fund also seeks to enjoin Toni, inter alia, from either continuing or initiating any proceedings to enforce an award of attorney's fees against the Fund to Toni.

A.

We first address the issue of whether attorney's fees may properly be awarded under ERISA to Toni in connection with the matter sub judice. ERISA provides that in any action pursuant to ERISA, "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). The district court found that the award of attorney's fees to Toni was proper under this court's decision in *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981).

In *Stone*, we held that a nonemployee ex-spouse such as Toni, was a participant within the meaning of ERISA, 29 U.S.C. § 1132(a)(1)(B). This statute provides:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> • • • •
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

Id.

This conclusion was based upon the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa*, 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980), for want of a federal question, *see Stone v. Stone*, 632 F.2d at 742. The effect of the court's summary dismissal of *In re Marriage of Campa*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362 (1979), acted as a decision on the merits that is controlling on lower federal courts. *See Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 748 (1980) (citing, inter alia, *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975)). Thus, the summary dismissal established that ERISA does not preempt a state's community property law as it relates to the payment of pension fund benefits. *See Kronschnabel*, 632 F.2d at 748. We concluded in *Stone*, that if ERISA permits the transfer of an employee's pension benefit rights to an ex-spouse pursuant to state community property law, then it impliedly authorizes an ex-spouse to enforce these rights pursuant to 29

U.S.C. § 1132(a)(1)(B). *See* 632 F.2d at 743.[2] It follows from *Stone* that if the nonemployee ex-spouse is able to enforce his or her rights as a participant, he or she is permitted as a participant seeking to enforce these rights, the award of attorney's fees under 29 U.S.C. § 1132(g).

The Fund seeks to cast doubt on the validity of the rationale upon which *Stone* and *Kronschnabel* are based because of the reliance placed on *Campa*. The Fund argues that we are bound by the Supreme Court's summary dismissal in *Campa* only until " 'doctrinal levelopments indicate otherwise.' " *Hicks v. Miranda*, 422 U.S. at 344, 95 S.Ct. at 2289 (quoting *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n. 3 (2d Cir. 1967)); *see also Hawaiian Telephone Co. v. Hawaii Dept. of Labor & Indus. Relations*, 614 F.2d 1197, 1198 (9th Cir.) (per curiam), *cert. denied*, 446 U.S. 984, 100 S.Ct. 2695, 64 L.Ed.2d 840 (1980).

Recent Supreme Court cases such as *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) are, according to the Fund, doctrinal developments indicating that the ERISA does preempt community property

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[2] *Stone* specifically referred to the right of a nonemployee ex-spouse to have access to the federal courts. 632 F.2d at 743. In *Stone*, the action had been removed to the district court and thus, the sole issue before the court was whether it had jurisdiction. *Id.* at 742. ERISA, 29 U.S.C. § 1132(e)(1) provides for concurrent state and federal jurisdiction for claims brought pursuant to 29 U.S.C. § 1132(a)(1)(B). Therefore, under *Stone* the nonemployee ex-spouse has access to both state and federal courts.

law as it relates to pension funds. None of these cases, however, presents the issue of whether a state's community property law is preempted by ERISA. Two of the cases address the issue of whether state community property laws are preempted by other federal statutes: *Ridgway* involved the preemption of state community property laws by the Servicemen's Group Life Insurance Act of 1965, 38 U.S.C. §§ 765-779; *McCarty* involved the issue of whether state community property laws are preempted by federal law concerning military non-disability retirement pay, 101 S.Ct. at 2730. *Alessi* on the other hand, involves ERISA but not state community property law. 101 S.Ct. at 1898 (court addressed issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards). Because these cases do not address whether ERISA acts to preempt state community property law we are compelled to follow *Campa.* We hold that attorney's fees may properly be awarded in the matter before us pursuant to ERISA, 29 U.S.C. § 1132(g).

We are cognizant of the fact that there are many questions, yet unresolved by the Supreme Court which result from the interplay between the law of community property and the provisions of ERISA. Review of these important issues by the United States Supreme Court would greatly assist fund administrators in meeting their responsibilities. *See, e.g., United States v. Ross,* ..... *U.S.* ....., ..., 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982).

B.

The Fund also seeks to enjoin the initiation or continuation of any proceedings in the state court to enforce an award to Toni of attorney's fees against the Fund. In so

doing, however, the Fund runs afoul of the principles of federalism recognized in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 756, 27 L.Ed.2d 669 (1971).

Younger and the line of cases that have followed limit the power of a federal court to enjoin state judicial proceedings. *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100, 111-113, 102 S.Ct. 177, 184, 70 L.Ed.2d 271 (1981); *L.H. v. Jamieson,* 643 F.2d 1351, 1352 (9th Cir. 1981). This court has held that abstention is appropriate where, inter alia: (1) the plaintiffs seek to enjoin the continuation of a state proceeding; and (2) the basis for federal relief could have been raised as a complete or partial defense during the normal course of the ongoing state proceeding *Id.* at 1352-53. Where these characteristics are present the exercise of restraint by the federal court is compelling. *Id.* at 1353-54.

The appeal by the Fund from the award of attorney's fees to Toni pursuant to ERISA is still pending in the California appellate courts. *Carpenters Pension Trust Fund v. Reyes,* 5 Civil No. 5725. The state court, without interference by process of this court, should determine the rights of the parties in the case before it, including the effect to be given to the instant case. *See Jamieson,* 643 F.2d at 1353-54.

IV. CONCLUSION

This matter is remanded to the district court to conduct an evidentiary hearing to determine the amount of reasonable attorney's fees incurred by Toni in responding to this appeal. The summary judgment of the district court is AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4353

Board of Trustees of Carpenters Pension Trust Fund for Northern California, an Employee Pension Benefit Plan,
Plaintiff-Appellant,

vs.

Toni Reyes, Ralph Reyes, Superior Court of the State of California, in and for the County of Merced, George C. Barrett, as Judge of said Court, and Michael Hennessey, as Sheriff of the City and County of San Francisco,
Defendants-Appellees.

Filed Mar. 9, 1983

ORDER

Before: SWYGERT,* KENNEDY and ALARCON, Circuit Judges

The Panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The cases cited by petitioner, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 679 F.2d 1307 (9th Cir. 1982) and *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981) are inapposite. Neither case deals with an attempt by the state to apply community property law to pension funds. As pointed out in the *Reyes* opinion, we are bound by the summary dismissal of *In re Marriage of Campa,* 444 U.S. 1028 (1980). *See Stone v. Stone,* 632 F.2d

740, 742 (9th Cir. 1980); *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 748 (9th Cir. 1980). Petitioner's arguments based on *Alessi* should be addressed to the Supreme Court, not this court.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

C 80-2746 SAW

Board of Trustees of Carpenters Pension Trust Fund for Northern California, an employee pension benefit plan,
Plaintiff,

vs.

Toni Reyes, et al.,
Defendants.

[Filed May 27, 1981]

JUDGMENT AND ORDER

The motion of defendant Toni Reyes for summary judgment having come on regularly for hearing on this 21st day of May, 1981, the court having heretofore dissolved the preliminary injunction issued herein on September 17, 1980, and having considered the arguments and authorities presented by counsel and having determined that there is no issue of genuine fact and that defendant Toni Reyes is entitled to judgment as a matter of law to the extent hereinafter provided,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Under the law as declared for the Ninth Circuit by the United States Court of Appeals in *Stone v. Stone,* 632 F.2d 740, and *Carpenters Pension Trust Fund for Southern California v. Kronschnabel,* 632 F.2d 745, defendant Toni Reyes is entitled to receive the payments of $220.00 per

month currently being deducted from the pension benefits due to defendant Ralph Reyes and being paid by plaintiff directly to her, and the deduction and payment of such monthly amount is not a breach of plaintiff's fiduciary duties and responsibilities under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., commonly known as ERISA.

2. Plaintiff shall make said deductions from the pension benefits due to defendant Ralph Reyes and pay said monthly amounts to defendant Toni Reyes so long as defendant Ralph Reyes is entitled to pension benefits under the Pension Plan administered by plaintiff and unless and until the making of such deductions and payments is no longer permitted by law.

3. The remaining issues presented in plaintiff's complaint for injunctive and declaratory relief are either presently being litigated before the Court of Appeal of the State of California, Fifth Appellate District, or affect defendant Ralph Reyes, who has not been served and has not appeared in this action. Therefore, said complaint is dismissed without prejudice as to the following issues:

(a) The issues as to the jurisdiction of the defendant Superior Court to award attorneys fees to defendant Toni Reyes against the Carpenters Pension Trust Fund for Northern California.

(b) The issue as to the validity and enforceability of the levy of execution on the money deposited by the Fund in its pension benefit account.

(c) The issue as to the right of the Fund to offset, recoup and recover the amount of any benefits paid to de-

fendant Toni Reyes from payments due or thereafter becoming due to defendant Ralph Reyes.

(d) The issue as to the applicability of Section 303 of the Consumer Credit Protection Act, 15 U.S.C. § 1673, to the Fund's deductions from the pension benefits due to defendant Ralph Reyes.

4. Pursuant to *Stone*, cited *supra*, defendant Toni Reyes is a participant pursuant to Section 502(g) of ERISA, 29 U.S.C. § 1132(g), and therefore is entitled to attorneys' fees in this action against the Carpenters Pension Trust Fund for Northern California. Defendant Toni Reyes is hereby awarded $3,296.00 for attorneys' fees and her costs of suit, the latter to be claimed and taxed in conformity with statute and the Local Rules of this Court. Counsel for defendant Toni Reyes is enjoined from receiving any fee for services herein in excess of that amount from said defendant. The amount allowed is to be obtained exclusively from the Carpenters Pension Trust Fund for Northern California.

IT IS HEREBY ORDERED that plaintiff's time for appeal of this judgment is hereby extended to and including July 8, 1981 and execution of the award for attorneys' fees is stayed until that date.

Dated: May 27, 1981

/s/ STANLEY A. WEIGEL
Judge

Appendix D

Relevant Sections of Employee Retirement Income Security Act, Labor-Management Relations Act, and California Civil Code

Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, provides in pertinent part:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

Section 205 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1055, provides:

(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

(b) In the case of a plan which provides for the payment of benefits before the normal retirement age as defined in section 3(24), the plan is not required to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity during the period beginning on the date on which the employee

enters into the plan as a participant and ending on the later of—

(1) the date the employee reaches the earliest retirement age, or

(2) the first day of the 120th month beginning before the date on which the employee reaches normal retirement age.

(c)(1) A plan described in subsection (b) does not meet the requirements of subsection (a) unless, under the plan, a participant has a reasonable period in which he may elect the qualified joint and survivor annuity form with respect to the period beginning on the date on which the period described in subsection (b) ends and ending on the date on which he reaches normal retirement age if he continues his employment during that period.

(2) A plan does not meet the requirements of this subsection unless, in the case of such election, the payments under the survivor annuity are not less than the payments which would have been made under the joint annuity to which the participant would have been entitled if he had made an election under this subsection immediately prior to his retirement and if his retirement had occurred on the date immediately preceding the date of his death and within the period within which an election can be made.

(d) A plan shall not be treated as not satisfying the requirements of this section solely because the spouse of the participant is not entitled to receive a survivor annuity (whether or not an election has been made under subsection (c)) unless the participant and his spouse have been married throughout the 1-year period ending on the date of such participant's death.

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

(f) A plan shall not be treated as not satisfying the requirements of this section solely because, under the plan there is a provision that any election under subsection (c) or (e), and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period (not in excess of 2 years) beginning on the date of such election or revocation, as the case may be. The preceding sentence does not apply unless the plan provision described in the preceding sentence also provides that such an election or revocation will be given effect in any case in which—

(1) the participant dies from accidental causes,

(2) a failure to give effect to the election or revocation would deprive the participant's survivor of a survivor annuity, and

(3) such election or revocation is made before such accident occurred.

(g) For purposes of this section:

(1) The term "annuity starting date" means the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability).

(2) The term "earliest retirement age" means the earliest date on which, under the plan, the participant could elect to receive retirement benefits.

(3) The term "qualified joint and survivor annuity" means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single annuity for the life of the participant.

(h) For the purpose of this section, a plan may take into account in any equitable fashion (as defined by the Secretary of the Treasury) any increased costs resulting from providing joint and survivor annuity benefits under an election made under subsection (c).

(i) This section shall apply only if—

(1) The annuity starting date did not occur before the effective date of this section, and

(2) the participant was an active participant in the plan on or after such effective date.

Section 206(d)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(d)(1), provides:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1), provides:

(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a

plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan,

or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954, (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a) (5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1)(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan, request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15

days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to inter-

vene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for

the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

Section 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1133, provides:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to a participant whose claim for benefits has been denied for a full and fair review by the the appropriate named fiduciary of the decision denying the claim.

Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, provides:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act. (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the

provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(c) For purposes of this section:

(1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b) or any rule or regulations issued under any such law.

Section 3022(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1222(a), provides:

Act Sec. 3022. (a) The Joint Pension Task Force shall, within 24 months after the date of enactment of this Act, make a full study and review of—

(1) the effect of the requirements of section 411 of the Internal Revenue Code of 1954 and of section 203 of this

Act to determine the extent of discrimination, if any, among employees in various age groups resulting from the application of such requirements;

(2) means of providing for the portability of pension rights among different pension plans;

(3) the appropriate treatment under title IV of this Act (relating to termination insurance) of plans established and maintained by small employers;

(4) the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans; and

(5) such other matter as any of the committees referred to in section 3021 may refer to it.

Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), provides:

"(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance,

disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

California Civil Code Section 4351 provides:

In proceedings under this part, the superior court has jurisdiction to inquire into and render such judgments and make such orders as are appropriate concerning the status of the marriage, the custody and support of minor children

of the marriage, the support of either party, the settlement of the property rights of the parties and the award of attorney's fees and costs; provided, however, no such order or judgment shall be enforceable against an employee pension benefit plan unless the plan has been joined as a party to the proceeding.

California Civil Code Section 4363 provides:

The court may order that a person who claims an interest in a proceeding under this part be joined as a party to the proceeding in accordance with rules adopted by the Judicial Council pursuant to Section 4001; however, an employee pension benefit plan shall be joined as a party to a proceeding under this part only in accordance with the provisions of Section 4363.1.

California Civil Code Section 4363.1 provides:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court. Upon entry of the order, the party requesting joinder shall file an appropriate pleading setting forth the party's claim against the plan and the nature of the relief sought. A copy of such pleading, a copy of the joinder request, a copy of the summons and a blank copy of a notice of appearance in form and content approved by the Judicial Council shall be served upon the employee pension benefit plan in the same manner as service of papers generally. Service of the summons upon a trustee or administrator of the employee pension benefit plan in his capacity as such, or upon any

agent designated by the plan for service of process in his capacity as such, shall constitute service upon the employee pension benefit plan. To facilitate service, the employee spouse shall furnish within 30 days after written request the name, title and address of the plan's trustee, administrator, or agent for service of process, to the non-employee spouse. If necessary, the employee shall obtain the information from the plan.

(b) A notice of appearance shall be filed and served by the employee pension benefit plan upon the party requesting joinder within 30 days of the date of the service upon the employee pension benefit plan of a copy of the joinder request and summons. Notwithstanding any contrary provision of law, the employee pension benefit plan shall not be required to pay any fee to the clerk of the court as a condition to filing such notice of appearance or any subsequent paper in the proceeding.

(c) If the employee pension benefit plan has been served and no notice of appearance, notice of motion to quash service of summons pursuant to Section 418.10 of the Code of Civil Procedure, or notice of the filing of a petition for writ of mandate as provided in such section, has been filed with the clerk of the court within the time specified in the summons or such further time as may be allowed, the clerk, upon written application of the party requesting joinder, shall enter the default of the employee pension benefit plan in accordance with Chapter 2 (commencing with Section 585) of Title 8 of Part 2 of the Code of Civil Procedure.

California Civil Code Section 4363.2 provides:

(a) The provisions of this section shall govern any proceeding in which an employee pension benefit plan has been joined as a party. To the extent not in conflict with this section and except as otherwise provided by rules adopted by the Judicial Council pursuant to Section 4001, all provisions of law applicable to civil actions generally shall apply regardless of nomenclature to the portion of such proceeding as to which the plan has been joined as a party if they would otherwise apply to such proceeding without reference to this section.

(b) The employee pension benefit plan may, but need not, file an appropriate responsive pleading with its notice of appearance. If it does not, then all statements of fact and requests for relief contained in any pleading served on the plan shall be deemed controverted by the plan's notice of appearance.

(c) Either party or their representatives may notify the plan of any proposed property settlement as it concerns the plan prior to the interlocutory hearing. If so notified, the plan may stipulate to the proposed settlement or advise the representative that it will contest the proposed settlement.

(d) The employee pension benefit plan shall not be required to, but may, appear at any hearing in the proceeding. For purposes of the Code of Civil Procedure, the plan shall be considered a party appearing at the trial with respect to any hearing at which the interest of the parties in the plan is an issue before the court. Those provisions of any order entered at or as a result of a hearing not attended by the plan (whether or not the plan received no-

tice of the hearing) which affect the plan or which affect any interest either the petitioner or respondent may have or claim under the plan, shall not become effective until 30 days after the order has been served upon the employee pension benefit plan; provided, however, that the plan may waive all or any portion of the 30-day period. If within the 30-day period, the plan files in the proceeding a motion to set aside or modify those provisions of the order affecting it, such provisions shall not become effective until the court has resolved the motion.

If the provisions of the order affecting the plan are modified or set aside, the court, on motion by either party, may set aside or modify other provisions of the order related to or affected by the provisions affecting the employee pension benefit plan.

(e) At any hearing on a motion to set aside or modify an order pursuant to subdivision (d), any party may present further evidence on any issue relating to the rights of the parties under the employee pension benefit plan or the extent of the parties' community or quasi-community property interest in the plan. Any findings of fact or conclusions of law made by the court with respect to the order which is the subject of the motion shall take account of such evidence.

California Civil Code Section 4370 provides:

(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be

reasonably necessary for the prosecution or defense of the proceeding or any proceeding relating thereto, including after any appeal has been concluded. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife of another party to the proceeding to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court:

(1) At the time of the hearing of the cause on the merits; or

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

(c) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

APPENDIX E

Extracts from Exhibit I

To Memorandum of Points and Authorities in Support of Plaintiff's Application for Temporary Restraining Order and Preliminary Injunction (CR 5, U.S. Ct. of App., Ninth Cir., No. 81-4353)

Summary Plan Description
of Pension Plan for Carpenters Pension
Trust Fund for Northern California

Section 1.11. "Employee" means an Employee as defined in Section 4 of Article 1 of the Trust Agreement.

"Section 4 of Article 1, Trust Agreement. The term "Employee" means any Employee of an Individual Employer who performs one or more hours of work covered by any of the Collective Bargaining Agreements. The term "Employee" shall also include employees of Local Unions and District Councils, and employees of labor councils or other labor organizations with which a Local Union or District Council is affiliated, or of any corporation, trust or other entity described in Section 3, with respect to whose work contributions are made to the Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of any of said employees is not a violation of any existing law or regulation, and provided further that the term "employee" as used in this section shall exclude clerical employees and employees covered by collective bargaining agreements with any such entity other than a Collective Bargaining Agreement."

Section 1.19. "Participant" means a Pensioner, or an Employee who meets the requirements for participation in the Plan as set forth in Article 2, or a former Employee who has acquired a right to a Pension under this Plan and has Separated from Covered Employment. A "Vested Participant" is an Employee who has achieved Vested Status in accordance with the provisions of Section 6.07.

Section 1.24. "Spouse" means a person to whom a Participant or Pensioner is legally married.

Section 2.02. Participation. An Employee who works in Covered Employment shall become a Participant as soon as he has performed at least 300 Hours of Work in Covered

Employment during any Calendar Year. The 300 hour requirement may be completed by Continuous Non-Covered Employment.

ARTICLE 7. HUSBAND-AND-WIFE PENSION

Section 7.01. Effective Date. The provisions of this Article do not apply:

a. to a Pensioner, the Effective Date of whose Pension was before September 1, 1976; or

b. to a Vested Participant who dies before his Pension Effective Date and who had a Separation from Covered Employment before January 1, 1976, unless he subsequently returned to Covered Employment and earned 3/12 of Future Service Pension Credit.

Section 7.02. Husband-and-Wife Pension after Retirement. The Husband and Wife Pension provides a lifetime pension for a married Pensioner, plus a lifetime pension for his surviving Spouse, starting after the death of the Pensioner.

When a Husband-and-Wife Pension is in effect, the amount of the Pensioner's monthly benefit is reduced in accordance with the provisions of Section 7.04, from the full amount otherwise payable. The monthly amount payable to the surviving Spouse of a deceased Pensioner who received a Husband-and-Wife Pension is one-half the monthly pension amount paid to the Pensioner.

a. Upon Retirement.

(1) A pension shall be paid in the form of a Husband-and-Wife Pension to a married Participant who(a) is at least age 55 on the Effective date of his Pension or, (b) is eligible for a Service Pension, unless the Participant files

with the Board, in writing, a timely rejection of that form of pension.

(2) A married Participant may reject the Husband-and-Wife Pension (or revoke a previous rejection) at any time before the first pension payment is made to the Participant, or within such further period as may be required by law or regulation.

b. Continuation of Husband-and-Wife Pension Form. The monthly amount of the Husband-and-Wife Pension, once it has become payable, shall not be increased if the marriage of the Pensioner and his Spouse is subsequently legally terminated or if the Spouse predeceases the Pensioner.

Section 7.03. Husband-and-Wife Pension before Retirement. In the event of death before retirement, the Husband-and-Wife Pension provides a lifetime pension to the Participant's surviving Spouse, under the circumstances described in this Section, subject to the conditions in Section 7.05.

If payable, the monthly amount payable to the surviving Spouse of an eligible Participant is one-half the amount of a Husband-and-Wife Pension, determined as if the pension had been effective on the day before the Participant died, in accordance with the provisions of Section 7.04.

a. After Normal Retirement Age, but before Retirement. If a married Participant who has attained Normal Retirement Age dies at a time when he was eligible for a pension, but before pension payments commenced, a Husband-and-Wife Pension shall be paid to his surviving Spouse.

b. Before Normal Retirement Age and before Retirement. A Husband-and-Wife Pension will be payable to the surviving Spouse of a Participant younger than the Normal Retirement Age, except as provided in the following paragraph, if he dies after attainment of age 55, but before the Effective Date of his Pension and if at the time of his death he was eligible for a Pension.

A Husband-and-Wife Pension will not be payable to the surviving Spouse of a Vested Participant who last Separated from Covered Employment before age 55 and who had not earned 3/12 of Future Service Pension Credit after that age.

Section 7.04. Adjustment of Pension Amount. When a Husband-and-Wife Pension becomes effective, the amount of the Retired Employee's monthly pension shall be reduced in accordance with a formula or formulas adopted by the Board based on the principles of overall actuarial equivalence and equitable adjustment for the cost of such annuities. A formula or formulas adopted by the Board may be made applicable by it from year to year, that is, the amount of reduction from the full single-life pension on account of the Husband-and-Wife Pension may be fixed in accordance with the adopted formula or formulas for:

a. any such pension, the effective date of which falls within the year, and

b. any election (or failure to reject) such pension which is exercised by the Employee within the year as his final choice.

However, the formula is not otherwise in any respect to be deemed a vested right of any Employee nor part of his

accrued benefit, and is subject to change by the Board for pensions commencing later or for elections (or rejections or revocations of either) which the Employee has the option to make later.

Section 7.05. Additional Conditions.

a. Husband-and-Wife Pension shall not be effective under any of the following circumstances:

(1) The Pensioner and the Spouse had not been lawfully married to each other throughout the year before his pension payments began.

(2) The Participant (other than a Pensioner) and his Spouse were not lawfully married to each other throughout the year preceding the Participant's death.

(3) The Spouse died before the Participant's pension began.

(4) The marriage of the Participant and his Spouse was legally terminated before the Participant's pension began.

b. The Board shall be entitled to rely on the written representation last filed by the Participant before his pension payments commenced as to whether or not he was married at such time and if married, as to when such marriage occurred. If a Participant represented to the Board in writing that he was not married or that he had not been legally married throughout the year before his pension payments began, no person shall be entitled to benefits under this Article on the grounds that she was, in fact, his Spouse, or if his Spouse, was in fact legally married to him throughout the year before his pension payments began.

Any payment made in good faith pursuant to any written statement of a Participant or beneficiary shall discharge all obligations of the Board of Trustees to the extent of such payments. No Husband-and-Wife Pension shall be payable to an individual claiming to be the lawful Spouse of a Participant unless written proof has been filed of such status with the Board prior to the month following the making of the first pension payment.

c. Any election or revocation may not be made after payment of the pension has commenced, or 90 days after the Participant has been notified of the effect on his pension of the election or rejection of the Husband-and-Wife Pension, whichever is the later date.

Section 7.06. Continuation of Husband-and-Wife Pension Form. The monthly amount of the Husband-and-Wife Pension, once it has become payable, shall not be increased if the marriage of the Pensioner and the Spouse is subsequently legally terminated or if the Spouse predeceases the Pensioner.

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No. 82-1697

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOARD OF TRUSTEES OF CARPENTERS PENSION TRUST FUND OF NORTHERN CALIFORNIA,
Petitioner,

vs.

TONI REYES et al,
Respondents.

Respondent TONI REYES'

BRIEF IN OPPOSITION

to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. When an employee covered by an ERISA-regulated plan divorces his spouse, who under state domestic-relations law is an absolute owner of an interest in the plan's benefits, did Congress express in ERISA itself a clear intention to pre-empt recognition of the spouse's rights (as opposed to an intention to pre-empt state regulation of the worker-employer relationship)?

2. If wife, as an owner, is indeed a participant in the plan pursuant to ERISA, can it be said that Congress specifically intended that she alone be specially excluded from the general right of plan participants to receive attorneys' fees against ERISA-regulated plans pursuant to 29 USC §1132(g), where a trial court has specifically found such an award to be proper?

3. Is the plan, in now attempting to re-litigate these issues in federal court after unsuccessfully litigating them fully in state court, and not then petitioning this Court for relief, now bound by the doctrine of res judicata (an adequate non-federal ground), and therefore not entitled to litigate anew, in this Court and in this case, those settled questions?

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below rests upon an adequate non-federal ground.

Petitioner has already fully litigated this issue in In re Marriage of Reyes, 5 Civil 3575, in the California Court of Appeal, which judgment petitioner itself has long since allowed to become final without timely petition for review in this Court. This reason alone is an adequate non-federal ground upon which this Court should now deny the petition. Vorbeck v. Whaley (8 Cir 1980) 620 F2d 191, 193.

2. The issue in this case has already been definitively, correctly and unanimously decided by the federal appellate courts, including this Court.

The issue herein is admittedly of major significance to plan administrators, family law litigants and attorneys, and others. Wife fully agrees with Petitioner that a definitive and unanimous rule is needed in this important field.

But petitioner already has that desired result. Every appellate court which has ruled on the question of whether Congress expressly intended in ERISA itself to pre-empt the traditional federal deference to state marital-property and family-support law has ruled the same way: no pre-emption. American Tel. & Tel. Co. v. Merry (2 Cir 1979) 592 F2d 118; Operating Engineers v. Zamborsky (9 Cir 1981) 650 F2d 197; Carpenters Pension Trust for Southern California v. Kronschnabel (1980) 632 F2d 745, cert den (1981) 453 US 922; Stone v. Stone (9 Cir 1980) 632 F2d 740, cert den (1981) 453 US 922 sub nom Seafarers International Union Pacific District-Pacific Maritime

Association Pension Plan v. Stone (#80-1403). And this Court has already so ruled: it dismissed the appeal in In re Marriage of Campa (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, app dism (1980) 444 US 1028. (See Hicks v. Miranda (1975) 422 US 332, 344.)

Petitioner says it wants a definitive ruling. It has already had several, including one from this Court. All have agreed with the decision below.

3. Petitioner's analogy to the military case is inapposite.

McCarty v. McCarty (1981) 453 US 210, and Ridgway v. Ridgway (1981) 454 US 46, stand only for the proposition that the special character of the federal military system pointed to an implicit Congressional mandate that effective military discipline

would be impossible were servicepersons to face a variety of marital-property laws in deciding whether to respond to orders to relocate. (Even this concern has, in light of recent legislative developments, proven too conservative.) These concerns of the military, of course, have no application to the far greater number of private, civilian workers governed by ERISA (such as Wife's former husband), who cannot be ordered to make an involuntary change of state residence.

It is significant that this Court's own denial of the petitions for certiorari in Stone and Kronschnabel, supra, came just one week after this Court's plenary decision in McCarty. It is more than obvious that the special circumstances of the military do not, and should not, control here.

4. The decision below does not conflict with any of this Court's own rulings.

Petitioner makes much of this Court's recent decision in Alessi v. Raybestos Manhattan, Inc. (1981) 451 US 504, regarding state workers' compensation procedures. Competing state remedies in favor of workers and against employers, of course, directly impede the federal statute's overall purpose: to provide uniform nationwide regulation of the delicate balance between the rights of a worker's family, on the one hand, and his employer or union, on the other. Striking down such state interference with that balance in no way implies, in law or in simple justice, that a spouse's own intrafamily rights, which do not adversely affect the employer, the union or the plan in any way, should not clearly be treated differently.

5. The decision below is the correct decision, and does not require that this Court expend its limited resources only to reach the same just result.

It has long been recognized by this Court that pre-emption by Congress of state domestic-relations law can never be presumed; it must be clearly stated. ERISA, of course, contains no such specific language.

It is also clear that recognition of the legitimate domestic-relations hegemony of the states requires a showing that a finding of pre-emption is necessary to avert "clear and major damage" to a federally-declared interest. There is obviously no such damage where an equal owner of a private, civilian retirement plan is confirmed her lawful share, in part to guard against her possibly becoming a public charge upon the federal taxpayer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, and Respondent TONI REYES should be awarded her costs and fees pursuant to §502(g) against petitioner for her opposition to the petition.

Respectfully submitted,

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San Francisco
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